



Comptroller General  
of the United States

Washington, D.C. 20548

145257

## Decision

**Matter of:** Appletown Food Service and Management  
Limited--Reconsideration

**File:** B-244519.2; B-244524.2

**Date:** November 7, 1991

E.A. Lumford for the protester.  
Jacqueline Maeder, Esq., Paul E. Jordan, Esq., and Paul I.  
Lieberman, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

### DIGEST

1. Dismissal of protest concerning agency's actions under the Section 8(a) program is affirmed since the General Accounting Office has no jurisdiction to review Small Business Administration's stewardship of the disadvantaged small business contracting program, absent circumstances not present here.

2. Allegation that agency acted in bad faith by not giving the protester an opportunity to cure its negative responsibility determination is dismissed since there is no requirement that the agency afford an offeror such an opportunity.

### DECISION

Appletown Food Service and Management Limited requests reconsideration of our dismissal of its protests that it should have received an award under request for quotations (RFQ) No. DAAG60-90-Q-0068 (RFQ-90), a non-competitive section 8(a) set-aside, and against the award of any contract under (RFQ) No. DAAG60-91-Q-0068 (RFQ-91), a successor, competitive section 8(a) procurement. Both RFQs were issued by the Department of the Army for food services at the U.S. Military Academy, West Point, New York, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988).<sup>1</sup>

We affirm our prior dismissal.

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<sup>1</sup>Section 8(a) authorizes the SBA to enter into contracts with government agencies and to arrange for contract performance by letting subcontracts to socially and economically disadvantaged small business concerns.

Both protests arise from the fact that Appletown had received a notice from the agency's pre-award monitor dated March 7, 1991, which stated that its financial capability had been favorably evaluated under RFQ-90, and that a non-competitive set-aside award was recommended. From this notice, Appletown concluded that it would receive the award, if it obtained appropriate financial backing. However, another pre-award survey was undertaken at the request of the contracting officer who questioned, among other things, the currency and reliability of Appletown's financial statements and whether Appletown had sufficient working capital to perform the contract. Based on a meeting between agency officials and Appletown representatives, the agency, in a letter dated March 22, recommended against award to Appletown because of "the absence of current/reliable financial statements and demonstrated financial capabilities" and its concern that Appletown's working capital was insufficient.

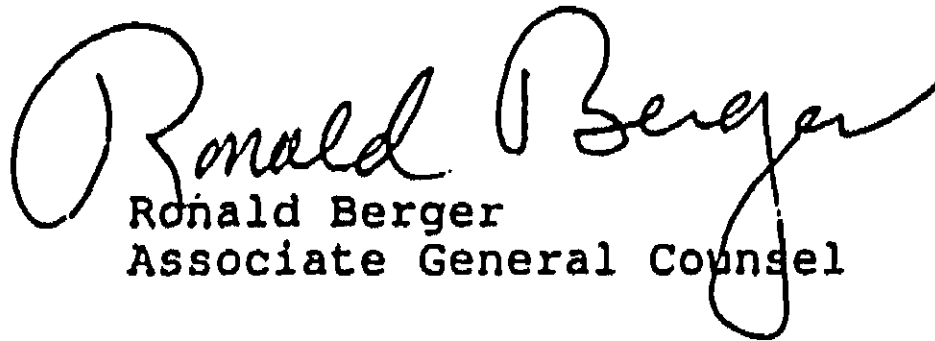
When the Army found Appletown nonresponsive, it requested that the Small Business Administration (SBA) withdraw Appletown's nomination for a non-competitive award and allow the Army to compete the procurement among 8(a)-eligible firms. The SBA concurred with the Army's determination and, as a result, on May 14, 1991, the Army canceled RFQ-90 and issued RFQ-91, a competitive 8(a) set-aside for the requirement. See 13 C.F.R. § 124.311 (1991), which provides for section 8(a) contracts to be competed, under certain circumstances, upon the request of the procuring agency, regardless of the anticipated award price.

On June 18, Appletown protested to our Office, arguing that Appletown should be awarded the contract under RFQ-90 based upon the March 7 pre-award survey and award recommendation, and that any award under RFQ-91 would be improper. We dismissed the protests because, absent evidence of violations of regulations or possible bad faith on the part of agency officials, our Office generally does not review the SBA's stewardship of the disadvantaged small business contracting program under the Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(4) (1991).

In its reconsideration request, Appletown renews its argument that it should be awarded the contract under RFQ-90. In addition, Appletown alleges that the agency's failure to inform Appletown of the amount of additional capital needed prevented it from curing its deficiencies and constitutes bad faith on the part of agency officials. We disagree.

As stated previously, our Office generally will not review an agency's actions under the section 8(a) program. See 4 C.F.R. § 21.3(m)(4); LNM Corp., B-244605, July 10, 1991, 91-2 CPD ¶ 43. Because of the broad discretion afforded the SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program generally is limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. See 4 C.F.R. § 21.3(m)(4); Lecher Constr. Co.--Recon., B-237964.2, Jan. 29, 1990, 90-1 CPD ¶ 127. Here, the protester has provided no evidence that regulations may have been violated. Further, the contracting officer may base a determination of nonresponsibility upon evidence of record, including preaward survey information. While a contracting officer may also discuss such information with a prospective contractor, he is not required to do so. Thus, the contracting officer's negative determination of responsibility, without advising Appletown of the specific amount of additional capital needed or otherwise providing an opportunity to defend against the evidence, does not constitute bad faith. LD Research Corp., B-237912.3, Sept. 9, 1988, 88-2 CPD ¶ 223. Moreover, as Appletown is a small business, the contracting officer's nonresponsibility determination necessarily was concurred in by the SE, thus further evidencing that the contracting officer's action was not taken in bad faith.

Accordingly, our prior dismissal is affirmed.

  
Ronald Berger  
Associate General Counsel